

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JEREMY J. WANN)	
Claimant)	
VS.)	
)	Docket No. 1,060,503
ANGEL ARMS)	
Respondent)	
AND)	
)	
NATIONAL UNION FIRE INS. CO. OF)	
PITTSBURGH, PA)	
Insurance Carrier)	

ORDER

Respondent requested review of the June 13, 2013, Award by Special Administrative Law Judge (SALJ) C. Stanley Nelson. The Board heard oral argument on October 8, 2013.

APPEARANCES

Melinda G. Young, of Hutchinson, Kansas, appeared for the claimant. Eric T. Lanham, of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. By agreement, the SALJ and the parties did not consider the transcript from the preliminary hearing held on October 19, 2012, nor any of the exhibits attached thereto. Therefore, the Board has excluded the same from its consideration for the purposes of this decision. At the oral argument to the Board, the parties stipulated claimant has a 5 percent whole person functional impairment as the result of this accident, followed by a 50 percent permanent partial general (work) disability effective December 19, 2012. Additionally, it was noted that the SALJ failed to address in the award whether claimant was an employee of respondent on the date of the accident and whether timely notice of this accident was given to respondent. The parties agreed that claimant was an employee of respondent on the date of accident and timely notice of the accident was provided. Finally, the parties

agreed that claimant's average weekly wage on the date of accident was \$480.00. This calculates to a weekly compensation rate of \$320.02, with the fringe benefits calculated at \$53.21 per week to be added to claimant's wage effective June 21, 2012, claimant's last day worked with respondent. Claimant was awarded a functional disability award of 5 percent for a period of 20.75 weeks. This functional award pays out during the period claimant remained employed with respondent at a comparable wage and was still receiving the stipulated fringe benefits. The weekly benefit calculation should have been based upon the \$480.00 wage without the inclusion of the fringe benefits. This reduces the weekly benefit during this functional disability period to \$320.02. Additionally, the SALJ deducted the weeks of functional disability from 415 weeks, rather than calculating the 50 percent work disability and then deducting the functional disability weeks from the resulting 207.5 weeks. The award calculations of the SALJ will be corrected by the Board accordingly.

ISSUES

The SALJ found claimant to be entitled to a 5 percent whole person functional impairment and, beginning December 19, 2012, a 50 percent permanent partial general (work) disability, which he determined claimant sustained as a result of the December 18, 2010, accident and injury. The SALJ also found that respondent should pay Dr. Larzalere's \$198.00 medical bill as an authorized medical expense and should be responsible for claimant's chronic pain management.

Respondent argues the SALJ erred when he calculated the disability payments, determining they should commence on December 19, 2012. Respondent acknowledges that K.S.A. 44-510e makes claimant eligible to receive disability benefits immediately upon suffering the injury on December 18, 2010. However, because claimant earned over 90 percent of his pre-injury wages for approximately 2 years following the accident, K.S.A. 44-510e limits claimant's entitlement to an award during that period to his 5 percent whole person functional impairment. Respondent agrees that, once claimant lost his job and his wage loss was 100 percent, he became entitled to a 50 percent work disability award. However, respondent contends the work disability award should be calculated with respondent being given credit for the 104 weeks between the date of accident and claimant's loss of employment on December 18, 2012, leaving claimant entitled to only 82.75 weeks work disability compensation.

Claimant argues that Award should be affirmed.

The issues raised by respondent on appeal to the Board involve whether the SALJ erred when he ruled that the functional impairment rating should be combined with the work disability, and that disability payments should commence the date the claimant became unemployed, rather than on the date of the injury. Respondent disputes both:

The amount and duration of any work disability awarded and whether respondent is entitled to a credit for the weeks which transpired while claimant was earning a wage equal to or higher than 90 percent of his average weekly wage on the date of accident.

FINDINGS OF FACT

Claimant worked as a CMA for respondent. On December 18, 2010, claimant felt a pop in his low back while transferring a resident from a recliner to a wheelchair. Claimant was being assisted by another staff member. He reported the accident to Sabrina Sharp, respondent's director of nursing, and was sent for medical treatment and eventually treated with pain management. Claimant was diagnosed with two herniated discs and a fractured vertebrae in his back.

Claimant testified he suffered another injury to his back on June 21, 2012, while attempting to transfer a resident from a bed to a chair. He testified to feeling a sharp pain in the bottom right-handed side of his back. Claimant again reported this injury to Ms. Sharp and was provided medical care with Dr. Larzalere. Claimant acknowledged, at the regular hearing, that he suffered no ongoing problems as the result of the June 21, 2012, accident. Any increased symptoms stemming from that accident were temporary. The \$198.00 medical bill ordered paid by the SALJ stems from claimant's treatment with Dr. Larzalere after the June 21, 2012, accident. Claimant's employment was terminated on June 23, 2012, two days after his second accident.

In July 2012, claimant worked for three weeks for The Evangelical Lutheran Good Samaritan Society and then claimant worked for McPherson Care Center, before going to work for Hutchinson Medical Center in October 2012. Claimant's employment with Hutchinson Medical Center ended on December 18, 2012. Effective December 19, 2012, claimant's wage loss became 100 percent.

The parties have stipulated that claimant suffered personal injury by accident, which arose out of and in the course of his employment with respondent resulting in a 5 percent permanent partial whole body functional impairment and a permanent partial general disability of 50 percent effective December 19, 2012. As such, the Board will not repeat the factual findings contained in the Award. The only dispute in this matter questions the method of calculating the permanent partial disability award.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2000 Furse 44-510e(a) states:

(a) If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general

disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. Weekly compensation for temporary partial general disability shall be 662.3% of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto. Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. If the employer and the employee are unable to agree upon the employee functional impairment and if at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee functional impairment which shall be considered by the administrative law judge in making the final determination. The amount of weekly compensation for permanent partial general disability shall be determined as follows:

- (1) Find the payment rate which shall be the lesser of (A) the amount determined by multiplying the average gross weekly wage of the worker prior to such injury by 66 2/3% or (B) the maximum provided in K.S.A. 44-510c and amendments thereto;
- (2) find the number of disability weeks payable by subtracting from 415 weeks the total number of weeks of temporary total disability compensation was paid, excluding the first 15 weeks of temporary total disability compensation that was paid, and multiplying the remainder by the percentage of permanent partial general disability as determined under this subsection (a); and

(3) multiply the number of disability weeks determined in paragraph (2) of this subsection (a) by the payment rate determined in paragraph (1) of this subsection (a).

The resulting award shall be paid for the number of disability weeks at the full payment rate until fully paid or modified. If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto.

Respondent contends the proper method of calculating a work disability which follows first a functional impairment and then a period of time where claimant is earning a comparable wage would allow respondent credit for the weeks when claimant is working and earning a comparable wage. In this instance, claimant was awarded a 5 percent functional impairment, equal to 20.75 weeks of compensation. Claimant continued to work for respondent and other employers at a wage equal to or greater than 90 percent of his average gross weekly wage on the date of accident. This work period of employment with respondent lasted until June 21, 2012. At that time, claimant lost his job for respondent, but obtained employment with other employers, again at a wage equal to or greater than 90 percent of the average gross weekly wage claimant was earning on the date of accident. These subsequent employments lasted until December 19, 2012, a total period stipulated by the parties as 104 weeks. Claimant has remained unemployed since that time. The parties agree claimant has a 100 percent wage loss, effective December 19, 2012. As this record does not support a task loss, under K.S.A. 44-510e, claimant's agreed upon work disability is 50 percent.

The Board's method of calculating the award when either the functional impairment or work disability changes is to calculate the award, or recalculate the award if benefits have already been paid, based on a different disability rating, using the new or latest disability rate as though no permanent partial benefits had been paid or were payable under any earlier disability rate. The award so calculated gives the total number of weeks and amounts payable for the award. If permanent partial benefits have previously been paid, based on a different rate of disability, respondent is entitled to a credit for those payments. The new work disability is calculated and respondent is given credit for the weeks of compensation, either functional impairment or work disability, previously paid. The Board does not and has never given credit to a respondent for weeks during which claimant is working at a comparable wage. To give respondent credit for those weeks would be to allow respondent credit for disability weeks during a time claimant does not qualify for a work disability.

Respondent's argument was raised to the Board and the Kansas Court of Appeals in *Bohanan*.¹ In *Bohanan*, the respondent school district argued entitlement to credit for

¹ *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

some 36.14 weeks during the time Bohanan was working at her parking lot attendant position, with those weeks to be deducted from the total number of weeks due for the new work disability. The Court of Appeals found the Board's method of calculating the award, which rejected respondent's request, to be reasonable. The decision did not say the Board's method was the only method, only that it was reasonable.

In *Wheeler*², the Court of Appeals again affirmed the Board's method of calculating awards. The Court reasoned the credit for the disability benefits paid should be given to the respondent, whether those benefits are for a functional impairment or work disability. The Court went on to rationalize the purpose of limiting work disability benefits to those injured workers who cannot earn comparable wages was designed, in part, to encourage employers to return injured employees to work, even at accommodated positions.³ The *Wheeler* court gave the employer credit for the permanent partial disability benefits it had paid. No credit was allowed for weeks during which the claimant was earning a comparable wage.

In a later decision, the Court of Appeals in *Ponder-Coppage*⁴, again affirmed the Board's method of calculating a change in work disability when a review and modification was requested under K.S.A. 44-528. The Court held that, under K.S.A. 44-528(d), the effective date of the modification award is properly the date the increase or diminishment actually occurred, with the 6 month prior limitation being enforced with review and modification requests. The *Ponder-Coppage* Court acknowledged the language in K.S.A. 44-510e which allows compensation, not to exceed 415 weeks "following the date of such injury . . ."⁵ But, still limited the credit, effective as of the date the increase or decrease actually occurred.

The dissenting Board Member fails to properly apply the Kansas Supreme Court's logic in *Bergstrom*,⁶ where Kansas Supreme Court held:

When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no

² *Wheeler v. Boeing Co.*, 25 Kan. App. 2d 632, 967 P.2d 1085 (1998).

³ *Id.* at 637.

⁴ *Ponder-Coppage v. State*, 32 Kan. App. 2d 196, 83 P.3d 1239 (2002).

⁵ *Id.* at 198.

⁶ *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

need exists to resort to statutory construction. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).⁷

K.S.A. 2000 Supp. 44–510e(a) states in pertinent part, “In any case of permanent partial disability under this section, the employee will be paid compensation for not to exceed 415 weeks following the date of such injury. . .” That merely limits an injured worker to a maximum of 415 weeks of PPD following his or her date of injury. There is no statutory provision allowing the time period after the date of injury to magically extend to 519 weeks as the dissent sets forth.

The dissent argues that the employer is entitled to a credit for periods during which claimant earns wages equal to 90 percent average weekly wage during the 415 week period following the date of accident. However, there is no such credit set forth in the Kansas Workers Compensation Act. K.S.A. 2000 Supp. 44-510e(a) is unambiguous and the majority is following its express language.

The Board rejects respondent’s contention that it is entitled to a credit for 104 weeks during which claimant was earning a comparable wage. Claimant’s entitlement to a work disability became effective the day after he lost his job and his wage loss became 100 percent. Respondent’s entitlement to a credit is, likewise, limited to the periods of time claimant’s position actually changes and a work disability award becomes necessary.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to award claimant 20.75 weeks of functional disability compensation at the rate of \$320.02 per week. Those functional disability weeks will then be deducted from the 207.5 work disability weeks representing a 50 percent work disability. The remaining award is affirmed in so far as it does not contradict the findings and conclusions contained herein.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge C. Stanley Nelson dated June 13, 2013, is modified to award claimant 20.75 weeks of permanent partial functional disability at the weekly rate of \$320.02, totaling \$6,640.42, followed by 186.75 weeks of permanent partial general disability at the weekly rate of \$355.49, totaling \$66,387.76, for a total award of \$73,028.18.

As of November 18, 2013, claimant is entitled to 20.75 weeks of compensation at the weekly rate of \$320.02, totaling \$6,640.42, followed by 47.86 weeks of permanent

⁷ *Id.* at 607-608.

partial general disability compensation at the weekly rate of \$355.49, totaling \$17,013.75, for a total due and owing of \$23,654.17, minus amounts previously paid. Thereafter, claimant is entitled to compensation for 138.89 weeks at the rate of \$355.49, totaling \$49,374.01, until fully paid or upon further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of November, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the majority finding that respondent is not entitled to a credit for periods during which claimant was making greater than 90 percent of the average gross weekly wage he was earning at the time of the injury.

K.S.A. 2010 Supp. 44–510e(a) states, in part:

If there is an award of permanent disability as a result of the compensable injury, there will be a presumption that disability existed immediately after such injury. In any case of permanent partial disability under this section, the employee will be paid compensation for not to exceed 415 weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44–528 and amendments thereto.

...

An employee will not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages' equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Because there is a limited duration during which claimant is entitled to permanent partial general disability benefits, the time during which claimant does not qualify for benefits must be subtracted from the 415 weeks. The employer is entitled to a credit for periods during which claimant earns wages equal to 90 percent average weekly wage during the 415 week period following the date of accident.

By not subtracting the weeks during which claimant was making greater than 90 percent of his average weekly wage from the 415 maximum period of benefits, the majority has extended the benefit period beyond the 415 week maximum. In this case, by not subtracting the 104 weeks, the majority extends the 415 week period to 519 weeks.

The undersigned does not agree with respondent's argument that the weeks during which claimant was earning 90 percent of his wage should be subtracted from the work disability weeks. The period of employment during which claimant was making greater than 90 percent of his average weekly wage should be subtracted from the 415 week period.

The undersigned would find that 20.75 weeks of functional impairment and 104 weeks should be subtracted from the 415 period, leaving a period of 290.25 weeks that claimant would be eligible for work disability. This amount multiplied by 50 percent results in 145.13 weeks of compensation benefits, rather than the 207.25 weeks of work disability found by the majority.

BOARD MEMBER

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C. Stanley Nelson, Special Administrative Law Judge